

When you served in the Solicitor General's Office during the Reagan administration, you argued in three cases against the constitutionality of affirmative action programs, then once on the Third Circuit, you sided against the individual alleging discrimination in about three-quarters of the cases before you.

We have a lot to learn about what your views are and your legal reasoning, and how you would apply that legal reasoning. I really look forward to the questions, and once again, because this appointment is so important, I hope you really will be straightforward with us, and thereby be really straightforward with the American people.

So thank you, and welcome.

Chairman SPECTER. Thank you, Senator Feinstein.

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman.

I would like to also extend my congratulations to you, Judge Alito and your family. It is a very special day, a great honor to be nominated to the Supreme Court, the greatest court in the world, in my view, and this will be a good process. The Senate has an obligation to make a vigorous inquiry, and they will do so. I just hope and truly believe that by the end of these hearings your answers will be heard. The charges that I have heard made I know will be rebutted. People will listen and see the answers that you give, and when they do, they will feel great confidence in you as a member of the Supreme Court.

You have a record as a brilliant but modest jurist, one who follows the law, who exercises restraint and does not use the bench as an opportunity to promote any personal or political agenda. This is exactly what I believe the American people want in a Justice to the Supreme Court. It is exactly what President Bush promised to nominate. You represent philosophically that kind of judge who shows restraint, but at the same time you bring extraordinary qualifications and abilities.

As has been said, judges are not politicians. They must decide discrete cases before them based on the law and the facts of that case. They are not policymakers. Every lawyer that has practiced in America knows that. That is what they want in a judge. That is what I understand they believe you are. That is why the ABA has given you their top rating, in my view.

This ideal of American law is the rule of law. It is the American ideal of justice, not to have an agenda, not to allow personal views to impact your decisionmaking, and I am real proud to see that your record indicates that.

I like Judge Roberts's phrase of "modesty." I believe that is your philosophy also. We had the opportunity for a time to serve as United States Attorneys together. You were the top prosecutor in the office in New Jersey, one of the largest in the country. You had the whole State, much larger than my office. I know your reputation as one of ability, but modesty. In fact, I remember distinctly somebody told me, "Don't underestimate Sam Alito. He's a modest kind of guy, but he's probably the smartest guy in the Department

of Justice.” I think that is the reputation you had and one that you can be quite proud of.

Your record of achievement is extraordinary. You were Phi Beta Kappa at Princeton and a Woodrow Wilson scholar. You attended Yale Law School. You were an editor of the law review, elected by your colleagues, and of course, for a graduating law student at a prestigious law school or any law school, being an editor of the law review is an extraordinary honor.

You clerked for a Federal judge on the Third Circuit. You were an Assistant United States Attorney. You did appellate work, handling criminal cases, and as United States Attorney you were primarily a prosecutor. As I have checked the record, you will be the first person to serve on the Supreme Court since Tom Clark, who was appointed by Harry Truman in 1949, that had actual Federal prosecutorial experience, which I think is a great value. Matter of fact, I know it is a value. I have seen instances of Supreme Court rulings where errors have been made, mostly as a result of just not understanding the system and how it operates.

As an Assistant Solicitor General you argued 12 cases before the Supreme Court. That is an extraordinary number. Very, very few people in our country have had the opportunity to do that. Very few lawyers will ever in their career do one case much less 12.

So you did a great job, and I think that is why the ABA, the American Bar Association has rendered their views on you. It is a 15-member committee. All of them participate on a Supreme Court nominee. They take this very seriously. They interview judges with whom you work. They interview your colleagues. They interview people who litigated against you. They interview litigants who have lost before you as well as those who won before you, your co-counsel. And at the conclusion of all of that, they unanimously gave you their highest possible rating. I think that is an important thing. Some of us on our side of the aisle criticize the ABA. We say they tilt a little to the left, but their analysis process and the way they go about it provides valuable insight to this Committee and to the people of America, that the people of the country can know that they have interviewed a host of people who have dealt with you in every single area of your life, and they found you highly qualified, the best recommendation they can give, and that is something you should take great pride in.

We do not want an activist judge. That is not what we want in this country. By “activist” I mean a judge who allows his personal views to overcome a commitment to faithfully following the law, following the law as it is, not as you would like it to be, good or bad, following that law. That is what we count on. When we violate that, we undermine law, we undermine respect for law, and endanger this magnificent heritage of law that we have been given. From what I understand your approach to law, you have it right, and your record indicates that.

The judicial oath you take is important. Some might say you have to follow precedent and precedent is a very big part of what you do, but you take the oath to swear that you will support and defend the Constitution of the United States. You will take that oath if confirmed, and you have already taken it as a Third Circuit Judge. It is an oath not to decide whether a decision is good policy

or not. That is for the legislative branch. It is not an oath to defend the wall that the Supreme Court has enclosed sometimes around itself. It is not an oath to avoid admitting error in previous decision. But let me be more direct. The oath you take is not an oath to uphold precedent whether that precedent is super duper or not. If you love the Constitution, which I hope you do, and I intend to inquire about that, you will enforce the Constitution as it is, good and bad. That is your responsibility in our democracy.

We have already had this morning some matters that have been raised, and I think are worthy of just responding to briefly because allegations get made in these hearings, you may never get a chance by the time this hearing is over to rebut some of the things that have already been raised. Senator Kennedy claimed that you have not offered an opinion or a dissent siding with a claim of racial discrimination. I would point him to *U.S. v. Kithcart*. There you made it clear that the Constitution does not allow police officers to racially profile black drivers. A police officer received a report that two black males in a black sports car had committed three robberies. Later they pulled over a driver because he was a black man in a black sports car. You wrote that this violated the Fourth Amendment. You stated that the mere fact that Kithcart was black and the perpetrators had been described as two black males was plainly insufficient.

They also may want to look at your majority opinion in *Brinson v. Vaughn*, where you rule that the Constitution does not allow prosecutors to exclude African-Americans from jurors, and you granted the petitioner's habeas petition in that case, reversing the conviction. You stated the Constitution guarantees, "that a State does not use peremptory challenges of jurors to remove any black jurors because of his race, thus a prosecutor's decision to refrain from discriminating against some African-American voters does not cure discrimination against others."

As for dissents, you were the lone dissenter calling for an expansive interpretation of civil rights laws. Your dissent complained in an employer case that the majority had substituted its own opinion for the law, and you dissented, and later the Supreme Court vindicated you, 9-0.

I would also note you were questioned about judicial independence. I think some of our people have mentioned that, but an academic study of Federal Appeals Court opinions rated you the fourth most independent judge in the Federal judiciary. That is out of 98. They took that based on issues such as whether or not you are most likely to disagree with judges or agree with judges of a different political party.

Mr. Chairman, I thank you for your leadership, and look forward to a vigorous hearing. I am confident this nominee has the skills and graces to make an outstanding Supreme Court Justice.

Chairman SPECTER. Thank you, Senator Sessions.

We are going to turn to one more Senator, Senator Feingold, for an opening statement, and then we are going to take a 15-minute break. We will have concluded the opening statements of 12 of our 18 Judiciary Committee members. That will leave us four more. Then Senator Lautenberg and Governor Whitman to make the formal presentation of Judge Alito, and then Judge Alito's opening

statement. At this time we will adjourn and we will reconvene at 2:10.

Pardon me. We are going to proceed with you, Senator Feingold.
[Laughter.]

Senator FEINGOLD. Thank you, Mr. Chairman, I think.

Senator LEAHY. This is called the potted plant routine, Russ.

[Laughter.]

Chairman SPECTER. I am so anxious for the recess, I jumped the gun a little.

[Laughter.]

**STATEMENT OF SENATOR RUSSELL D. FEINGOLD, A U.S.
SENATOR FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Mr. Chairman, I too want to welcome our nominee and thank him in advance for the long hours that he will put in this week.

Judge, I do greatly admire your legal qualifications, and of course, your record of public service, and I wish you well here. And as with the hearing and the nomination of Chief Justice Roberts, I approach this proceeding with an open mind.

Judge Alito, I know that as a long-time student of the law in the Supreme Court, you appreciate the importance of the process that we begin today. A position on the Supreme Court is one of the highest honors and greatest responsibilities in our country. The Constitution requires the Senate to offer its advice and decide whether to grant its consent to your nomination, and the Senate has duly delegated to the Judiciary Committee the task of examining your record and hearing your testimony and responses to questions about your views.

So it is our job in these hearings to try to get a sense for ourselves, for our colleagues who are not on the Committee, and for the American people, of whether you should be given the enormous responsibility of protecting our citizens' constitutional freedoms on the Supreme Court. So you will, obviously, face tough questions here, Judge.

No one is entitled to a seat on the Supreme Court simply because he has been nominated by the President. I think the burden is actually on the nominee to demonstrate that he should be confirmed.

We begin these hearings today at an important time. Less than a month ago we learned that this administration has for years been spying on American citizens without a court order and without following the laws passed by Congress. Americans are understandably asking each other whether our Government believes it is subject to the rule of law. Now more than ever we need a strong and independent judicial branch. We need judges who will stand up and tell the executive branch it is wrong when it ignores or distorts the laws passed by Congress. We need judges who see themselves as custodians of the rights and freedoms that the Constitution guarantees even when the President of the United States is telling the country that he should be able to decide unilaterally, unilaterally, how far these freedoms go.

To win my support, Judge Alito will have to show that he is up to the challenge. His instincts sometimes seem to be to defer to the executive branch to minimize the ability of the courts to question